

In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City
CSC Docket No. 2012-750
(Civil Service Commission, decided February 22, 2012)

Nicholas R. Foglio, represented by Carl N. Tripician, Esq., appeals the bypass of his name on the Fire Fighter (M2246D), Ocean City, eligible list.

By way of background, the appellant, a nonveteran, appeared as the 11th ranked eligible on the Fire Fighter (M2246D), Ocean City, eligible list, which promulgated on March 16, 2004 and expired on November 2, 2007. The eligible list was certified to the appointing authority on May 24, 2007 with 15 names. The appellant, who ranked third on the certification, was bypassed for appointment and Daniel Coan,¹ Kenneth Pollack, Jr., and Kimberly McKay, who ranked second, eighth, and tenth on the certification, respectively, were appointed effective July 11, 2007. The appellant had been a volunteer firefighter and an emergency medical technician for over eight years when his name was certified. Pollack and McKay had experience as a bartender and a lifeguard, respectively. The appellant appealed his bypass to the Division of Local Human Resource Management (LHRM),² which found that the appointing authority properly disposed of the certification. The appointing authority informed LHRM that Pollack and McKay were appointed because each of them “best meets needs of Department.” It is noted that the appointing authority signed the following declaration on the certification that “[a]ny appointment of an eligible not standing highest in certification has not been by reason of race, color, sex, political beliefs or creed but because of those reasons listed in the Disposition/Comments column.” The appellant then appealed to the Civil Service Commission (Commission). The appointing authority argued that the appellant had not offered evidence showing that it had violated the “Rule of Three,” *N.J.A.C.* 4A:4-4.8(a)3, and that it had properly exercised its discretion in the appointments it made. The Commission found that the appellant had the burden of proof, by a preponderance of the evidence, to show that he had been improperly bypassed. It further found that the appointing authority had indicated in disposing of the certification that it appointed lower-ranked eligibles because they best met the needs of the fire department. The Commission noted that placement on an eligible list does not guarantee appointment, but only consideration for a vacancy. Finally, the Commission found that the appointing authority was permitted to appoint individuals with lesser qualifications than the bypassed eligible, so long as the decision was not based on an unlawful motive, such as discrimination or political influence. Accordingly, the Commission upheld the

¹ Since Coan ranked second and the appellant ranked third on the certification, the appellant was not bypassed when Coan was appointed. Additionally, the first ranked eligible was removed.

² LHRM is now the Division of State and Local Operations.

appellant's bypass. *See In the Matter of Nicholas R. Foglio* (CSC, decided February 11, 2009).

The appellant appealed to the Superior Court of New Jersey, Appellate Division. Upon its review, the court determined that the Rule of Three was designed to afford an appointing authority with some degree of discretion in making appointments. Meanwhile, the court said that eligible lists are not promulgated for the benefit of any particular individual, but an eligible's interest in being on a list is in being considered for a vacancy. Additionally, the court held that the Rule of Three permitted an appointing authority to bypass an eligible for lower-ranked individuals for a legitimate reason. The court observed that nine eligibles were removed from the list for various reasons, while, of the remaining nine, the ninth-ranked eligible had filed a late response to the certification, and the appointing authority appointed the eligibles in question for reasons other than an improper motive, such as age or gender discrimination or anti-union animus. Therefore, the court affirmed the Commission's decision. *See In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, Docket No. A-3609-08T3 (App. Div. June 24, 2010).

Thereafter, the Supreme Court of New Jersey granted the appellant's petition for certification. *In re Foglio*, 204 N.J. 39 (2010). Upon its review, the Supreme Court determined that N.J.A.C. 4A:4-4.8(b)4 requires a statement of reasons by the appointing authority for the selection of lower-ranked eligibles. The Court held that, as bypassing a higher-ranked eligible is facially inconsistent with principles of merit and fitness, the appointing authority must justify its selection of a lower-ranked eligible with a specific reason. The Court viewed Ocean City's reason as "boilerplate." It indicated that allowing the appointing authority to provide a nonspecific reason did not ensure that the bypass was based on merit and fitness. Therefore, the Court reversed the Appellate Division's decision and remanded the matter to Ocean City to supply a "proper statement of reasons" for the bypass. The appellant would then have an opportunity to make a showing before the Commission that the appointing authority's action was arbitrary. *See In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 N.J. 38 (2011) (attached).

It is noted that, at its meeting of December 7, 2011, the Commission approved for publication in the *New Jersey Register* an amendment to N.J.A.C. 4A:4-4.8, Disposition of a certification, which would delete the requirement for a statement of reasons, paragraph (b)4 of the rule. The Commission indicated that the rule provision was intended to ensure that an appointing authority exercises its discretion under the Rule of Three based on legitimate reasons. However, the Commission found that the requirement had done little to advance its original purposes. It also found that appointing authorities provide little reason on the certification for a bypass and routinely use phrases such as "best meets needs of the department," as was done in the instant matter. Thus, because paragraph (b)4 of

the rule is not required by statute and has not fulfilled its intended function, the Commission proposed its deletion. The rule proposal appeared in the January 17, 2012 issue of the *New Jersey Register*, 44 *N.J.R.* 137(a), and a public hearing on the proposal was held on February 9, 2012. The comment period expires on March 17, 2012. In the meantime, appointing authorities are required to submit a proper statement of reasons.

On July 25, 2011, the Director, Division of State and Local Operations, returned the May 24, 2007 certification of the Fire Fighter (M2246D), Ocean City, eligible list, to the appointing authority in order for it to dispose of the certification pursuant to the Supreme Court's opinion. The appointing authority returned the certification on August 19, 2011, bypassing the appellant and stating that "[w]ith respect to Pollack, Kenneth W. Jr. and McKay, Kimberly A., their interviews with the appointing authority demonstrated the maturity and temperament for the position." This agency approved the disposition of the certification. The appellant then filed the instant appeal, indicating that he will rely on his previous arguments to the Appellate Division and Supreme Court that his bypass was improper.

In response to the appellant's appeal, the appointing authority, represented by Dorothy F. McCrosson, Esq., indicates that there is insufficient space on the certification form to provide a detailed explanation of all the factors considered in the hiring process. It believed that the statement "best meets needs of Department" was sufficient for purposes of the certification. However, it has always maintained that the reason for the appellant's bypass was because his interview was weak and he lacks the "required" education.³ The appointing authority argues that an interview is a legitimate employment practice and it is "common knowledge" that the interview is often the most critical phase of the hiring process. In that regard, it submits that during an interview, the employer is able to evaluate the applicant's communication and social skills, as well as his or her level of interest and knowledge of the position. The interview is also a tool to assess the applicant's maturity and overall fit within the organization and may provide a glimpse of the manner in which an applicant handles stressful situations. The appointing authority claims that the appointed eligibles had better interviews with the former Business Administrator and that is why they were appointed. With regard to the Rule of Three, the appointing authority maintains that it has the discretion to appoint one of the top three candidates in the absence of an improper motive. In the appellant's case, the appointing authority states that there is no allegation of an improper motive. Further, since it has amended the May 24, 2007 certification consistent with the Supreme Court's mandate to provide a specific reason as to the

³ A Fire Fighter is required to have a high school degree or an approved high school equivalency certificate. The appointing authority does not claim that the appellant lacks this requirement nor does it clarify its position as to what education the appellant lacks. However, as indicated in the Commission's prior decision, the appellant did not list that he possessed a college degree and states that at least one eligible is a college graduate.

appellant's bypass, the appointing authority asserts that the appellant has not met his burden of showing that its actions were arbitrary.

The appellant replies that the reasons provided by the appointing authority for his bypass are unsupported by evidence or competent proofs. He submits that the appointing authority did not have specific guidelines as to what the Fire Department was seeking in a candidate. Moreover, no standard questions or other objective criteria were established prior to the interviews. In addition, the appellant emphasizes that the appointing authority did not take any notes, keep scores, or develop any kind of record to substantiate its selection.⁴ He contends that the appointing authority did not sufficiently document his performance during the interview. It is noted that the appellant does not challenge the questions posed during the interview. Rather, in his letter to the Commission, dated July 19, 2007, he claims that he answered all questions in a "direct and respectful manner." He also asserts that, upon conclusion of his interview, the Fire Chief informed him that he did very well. The appellant stated that the interview was conducted on June 15, 2007 by the Business Administrator and Fire Chief. Therefore, he claims that the appointing authority once again presents conclusory, unrevealing statements as to why he was bypassed, and thus, it has not satisfied its obligation under *N.J.A.C. 4A:4-4.8(b)*4. The appellant also alleges that the appointing authority "has now manufactured an entirely new reason." He contends that the appointing authority did not explain its prior statement of how lower ranked candidates "best [meet] needs of Department." Moreover, the appellant questions whether the appointing authority contacted the former Business Administrator and how all of a sudden the Business Administrator recalls the specifics of the three interviews. Furthermore, he emphasizes that the position at issue is Fire Fighter and not a conversationalist whose appointment might be justified by a better interview. The appellant highlights the fact that he had a higher test score than the appointed eligibles and had years of firefighting experience and training.

In reply, the appointing authority maintains that its amended statement complies with the Supreme Court's mandate. The specific reason why the appointed eligibles best met the needs of the Fire Department was that they performed better during their interviews. The appointing authority takes exception to the appellant's assertion that its reasons are "manufactured" or "entirely new." It states that this assertion is inaccurate and unsupported by the record. It points out that, in the appellant's July 19, 2007 letter, he states that he met with the Business Administrator sometime in July 2007 and was advised that he did not have the education for the position and his interview was weak. Thus, the appointing authority contends that the appellant has known these same reasons for over four years.

⁴ As indicated in the Commission's prior decision, the appointing authority stated that there were no records or documents relating to the interviews. The appointing authority advised the appellant that the Mayor accepted the recommendation of the Business Administrator who interviewed the eligibles and evaluated their performances.

The appellant responds that the appointing authority fails to submit any substantive explanation for his bypass. It only presents why it hired two lower ranking eligibles. He contends that the “maturity and temperament” of the appointed eligibles are irrelevant in this matter. In other words, the appellant contends that the law mandates that the appointing authority explain why it bypassed him, a higher ranking eligible. He asserts that the Supreme Court did not direct the appointing authority to justify its appointment of the two lower ranking eligibles.

In the final submission, the appointing authority replies that it has in fact provided a specific reason for the appellant’s bypass. It states that “[t]he specific area in which the other candidates bested Mr. Foglio was the interview. The City’s revised Certification makes that clear.”

CONCLUSION

N.J.A.C. 4A:4-4.8(a)3i provides in relevant part that upon receipt of a certification, an appointing authority shall appoint one of the top three interested eligibles (Rule of Three) from an open competitive list, provided that disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list. *See also*, *N.J.S.A.* 11A:4-8 and *N.J.S.A.* 11A:5-6. Moreover, *N.J.A.C.* 4A:4-4.8(b)4 states that in disposing of a certification, an appointing authority must, when bypassing a higher ranked eligible, give a statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tie score. *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority’s decision to bypass the appellant on an eligible list was improper.

In *Foglio, supra*, the Supreme Court determined that to satisfy the requirement of *N.J.A.C.* 4A:4-4.8(b)4, the appointing authority must provide a specific reason for the bypass. The Court stated that:

. . . it is clear that the boilerplate advanced by the City as an explanation for the bypass here was inadequate insofar as it failed to provide any real enlightenment whatsoever as to why the bypass occurred. That is not to suggest that the statement of reasons need be lengthy or multifaceted to pass muster. What is wrong with “best meets needs of Department” is not its brevity, but its failure to reveal anything about the bypass decision. The City might just as well have stated: “we liked them better,” an equally unrevealing explanation.

The required statement needs to address the reasons why a higher ranked candidate was bypassed. For example, the City might have relied on a preference for a college degree; or the performance of the applicants in the give-and-take of an interview; or on extraordinary character and employment references. Had Foglio been chosen over a higher-ranked eligible, the City could have pointed to his vast firefighting experience and training. Each of those reasons would have satisfied *N.J.A.C. 4A:4-4.8(b)(4)*. The possibilities are endless -- as varied as the candidates themselves. What is not permitted is the kind of conclusory, unrevealing statement issued in this case that did not explain the selection process or otherwise assure that the bypass of a higher-ranked candidate was not arbitrary. *Id.* at 49.

Initially, the appointing authority did not include education as the reason for the appellant's bypass in the amended certification, although it stated in its appeal response that it has always maintained that lack of the "required" education was also a basis for the bypass. As noted above, a Fire Fighter is only required to have a high school degree or an approved high school equivalency certificate. The appointing authority has not shown that the appellant lacks this requirement. As such, the Commission will not consider education as a factor in the appellant's bypass. Rather, the appointing authority amended the certification, stating that Pollack and McKay's interviews demonstrated their maturity and temperament for the position. The appellant claims that this statement is just as conclusory and unrevealing as was the appointing authority's original statement. The Commission disagrees. The Supreme Court indicated that the statement of reasons need not be lengthy or multifaceted, but rather, it must provide why the bypass occurred. Here, the appointing authority clearly informed this agency that the reason for the appointments of these lower-ranked eligibles was their demonstrated performance during their interviews. Indeed, the Supreme Court noted that the appointing authority could have relied on the performance of the applicants in the interview as the reason for its bypass and such reason would satisfy *N.J.A.C. 4A:4-4.8(b)4*. Furthermore, the appellant argues that the appointing authority did not provide a substantive reason why his specific bypass occurred. However, *N.J.A.C. 4A:4-4.8(b)4* does not compel an appointing authority to articulate a negative reason or disqualifying factor why the appellant, a higher ranking eligible, was bypassed. As long as the appointing authority provides an explanation to justify why the lower ranking eligibles were appointed, *N.J.A.C. 4A:4-4.8(b)4* is satisfied. Thus, the Commission finds that the appointing authority has submitted a real statement of reasons and not boilerplate language, which the Supreme Court has deemed to be insufficient. Therefore, the Commission concludes that the appointing authority complied with *N.J.A.C. 4A:4-4.8(b)4* and submitted a proper statement of reasons.

Turning to the sufficiency of that reason, the appellant contends that the interview was essentially invalid since there is no documentation of the

performance of the applicants, such as notes or a standard set of questions which the applicants could be scored. He also argues that the reason was “manufactured” and “entirely new.” Moreover, he maintains that a better interview does not justify the appointment of a Fire Fighter.

Appointing authorities are permitted to interview candidates and base their hiring decision on the interview. The use of structured interviews with the assignment of numerical scores in a number of categories related to the position is a permissible way for an appointing authority to make a hiring decision. *See e.g., In the Matter of Wayne Rocco*, Docket No. A-2573-05T1 (App. Div. April 9, 2007) (Appellate Division determined that it was appropriate for an appointing authority to utilize an oral examination/interview process when selecting candidates for promotion); *In the Matter of Paul Mikolas* (MSB, decided August 11, 2004) (Structured interview utilized by appointing authority that resulted in the bypass of a higher ranked eligible was based on the objective assessment of candidates’ qualifications and not in violation of the Rule of Three). However, interviews, whether structured or not, are not required. It is within the appointing authority’s discretion to choose its selection method, *i.e.*, whether or not to interview candidates and ask hypothetical questions. *See e.g., In the Matter of Angel Jimenez* (CSC, decided April 29, 2009); *In the Matter of Abbas J. Bashiti* (CSC, decided September 24, 2008); *In the Matter of Paul H. Conover* (MSB, decided February 25, 2004); *In the Matter of Janet Potocki* (MSB, decided January 28, 2004). Thus, since conducting interviews is discretionary, the lack of documentation or structure in the appellant’s interview is not cause to find that his bypass was improper. So long as the hiring decision is in compliance with *N.J.A.C. 4A:4-4.8(a)3i*, the Commission cannot find that the interview was conducted inappropriately. Indeed, the appellant does not challenge the interview itself. For instance, he does not claim that he was interviewed in an unlawful manner or was asked unlawful questions. *See e.g., Conover, supra* (The Merit System Board found that the appellant failed to present any substantive evidence that he was interviewed in an unlawful manner or was asked unlawful questions. The record also did not establish that that the appellant was subject to a more rigorous interview, and thus, the appellant’s appeal of his bypass on a Police Lieutenant eligible list was denied). Rather, the appellant argues that having a better interview does not justify the appointment of a Fire Fighter. The Commission disagrees. As indicated above, so long as the interview complies with *N.J.A.C. 4A:4-4.8(a)3i*, appointing authorities are permitted to interview candidates and base their hiring decision on the interview. This is within an appointing authority’s selection discretion and may apply to all positions, including Fire Fighters.

Furthermore, the Commission finds that the appointing authority was in compliance with *N.J.A.C. 4A:4-4.8(a)3i*, as it has shown that the appointments of Pollack and McKay were based on merit and fitness considerations. In that regard, the appointing authority deemed these candidates to possess the maturity and

temperament needed for a Fire Fighter position. Their interviews revealed the possession of these characteristics. Additionally, although the appellant contends that he has significant experience and training as a Fire Fighter, Pollack and McKay have also been deemed eligible for the position by virtue of their passing the Fire Fighter examination, appearing on the eligible list (M2246D), and having no disqualifying issues in their background. The appellant has not alleged nor submitted any evidence whatsoever to conclude that the reason set forth by the appointing authority for his bypass was pretextual. The record also does not reveal invidious motivation in the appellant's non-selection. *Compare, In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 N.J. Super. 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing).

Nonetheless, even assuming that improper motives were asserted by the appellant, an analysis of the competing justifications to ascertain the actual reason underlying the actions would be warranted. *See Jamison v. Rockaway Township Board of Education*, 242 N.J. Super. 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court outlined the burden of proof necessary to establish discriminatory and/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for the decision. If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to appoint, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant. As noted earlier, the appellant has not established discrimination, retaliation or other improper motive as a reason for his bypass, and therefore, he has not established a *prima facie* case of discrimination or retaliation.

However, assuming, *arguendo*, that the appellant had established a *prima facie* case of discrimination or retaliation, the appointing authority has articulated a legitimate reason for its bypass of the appellant. Further, the Commission does not find any support for the appellant's argument that the reason for his bypass was "manufactured" and "entirely new." Rather, the record reveals that the appellant's performance during the interview was a reason given to him by the Business

Administrator for his bypass back in 2007. Moreover, the appointing authority signed the May 24, 2007 certification, declaring that “[a]ny appointment of an eligible not standing highest in certification has not been by reason of race, color, sex, political beliefs or creed but because of those reasons listed in the Disposition/Comments column.” The appointing authority has clarified those reasons in order to be in compliance with *N.J.A.C.* 4A:4-4.8(b)4. Therefore, the appellant has not shown that the reason for his bypass was pretextual. Accordingly, he has not established an unlawful intent on the part of the appointing authority in order for him to meet his burden of proof under the foregoing standard.

It must be emphasized that, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the Rule of Three, absent any unlawful motive. *See N.J.A.C.* 4A:4-4.8(a)3i; *Terry v. Mercer County Board of Chosen Freeholders*, 86 *N.J.* 141, 149 (1981) (The Rule of Three affords an appointing authority some latitude in making its hiring decision, by not requiring the appointment of the highest ranking candidate.) There is nothing in the record to indicate that the appellant’s non-selection was arbitrary or based on an unlawful motive. Further, it is noted that the appellant does not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990); *Crawley*, *supra* at 210. Accordingly, a thorough review of the record indicates that the appointing authority’s bypass of the appellant was proper and the appellant has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.